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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-20

ELIZABETH M. LEWIS,
Petitioner,

v.

TUCSON SCHOOL DISTRICT NO. 1, HONORABLE RICHARD N. ROYLSTON, as Judge of the Superior Court in and for the County of Pima, State of Arizona,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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STATEMENT OF THE CASE

Respondent agrees with Petitioner's Statement Of The Case to the end of the first full paragraph on page 4 of the Petition.

However, as to Petitioner's statement concerning her "unique educational background" (page 5), no such evidence was ever presented to the Board. On the contrary, Dr. Thomas L. Lee, Respondent's Superintendent, told Respondent's Board, at a meeting held prior to a public meeting held on October 26, 1972, that there was nothing unique about either Petitioner's abilities or position. This and other statements as to Petitioner's uniqueness were reiterated by Dr. Lee in his deposition taken July 30, 1973, (the relevant extracts of which are reproduced

as Appendix A herein), and were corroborated by Mr. Patrick of Respondent's Personnel Office during the November 5, 1973, meeting between Petitioner and Respondent's Board of Trustees. Mr. Patrick's statements are set out in the portions of the transcript of the November 5, 1973, meeting reproduced as Appendix B herein.

The denial by the Board of Petitioner's Application for Retention was announced on December 19, 1973, not 1972, as stated at page 4, paragraph of the Petition. Contrary ot Petitioner's assertion that the Board heard no evidence as to either of the possible grounds for retention, the Board did consider the difficulty of replacing Petitioner. This is shown by the discussion of Petitioner's lack of uniqueness referred to in the previous paragraph. At the November 5, 1975, meeting of the Board, Petitioner introduced no evidence tending to show that she was in fact irreplaceable. The Board indeed heard no evidence on the issue of whether retiring Mrs. Lewis would be injurious to students. However, at no time did Petitioner attempt to show that her absence would be detrimental, leaving the Board free to conclude that she could be replaced with no damage to the education of the students.

Finally, the document that Petitioner sets out in her Appendix "D" is not the text of the judgment of the Superior Court for which Petitioner is seeking review, but rather a Minute Order which itself was later amended. The correct text of the Superior Court judgment is reproduced as Appendix C herein.

REASONS FOR DENYING CERTIORARI

I. Petitioner Is Presenting Questions Not Argued In The Arizona Appellate Courts

A close examination of the language Petitioner uses in stating her "Questions Presented" reveals two things:

the two questions are in reality identical, and therefore redundant; and much of Petitioner's argument for granting *certiorari* has nothing to do with the questions as stated. Moreover, a comparison of the Petition with Petitioner's arguments in her Opening Brief before the Arizona Court of Appeals (reproduced as Appendix D herein) shows that these questions were not argued in that brief, did not appear as part of the Court of Appeals' actual judgment (reproduced in Petitioner's Appendix "E"), and therefore may not be properly before this Court.

The Arizona Superior Court (judgment reproduced as Appendix C herein) made findings on the retirement age mandated by A.R.S. § 15-1471; on the authority of Respondent to set reasonable standards in retiring its teachers; on the exercise of discretion by Respondent; and on possible deprivation by Respondent of Petitioner's equal protection and due process rights. Petitioner could have appealed all these findings, but instead she based her appeal on one question.

> "Is A.R.S. § 15-1471 unconstitutional insofar as it requires all public school teachers to retire at age sixty-five, whereas all other governmental employees are permitted to continue as State employees until age seventy?"

At least three times in her Court of Appeals brief, Petitioner maintained that this was the sole basis for her appeal.

On the other hand, Petitioner is now attacking the discretion and decision of Respondent under A.R.S. § 15-1471, at least in her "Questions Presented." In other words, she appears to be assuming the validity of the statute and challenging Respondent's interpretation of the statute. Based on Petitioner's own arguments in the court below, this is manifestly not the question on which

the Arizona Court of Appeals rendered its judgment. It is true the last paragraph of the opinion (Petition, Appendix "E" at 31) finds that Respondent did not abuse its discretion in retiring Petitioner. Yet clearly this is dictum. Nowhere in Petitioner's Opening and Reply Brief in the court below did she discuss the Board's discretion; and thus, the only finding necessary for the judgment was the one concerning the constitutionality of A.R.S. § 15-1471.

This Court has held that only in exceptional circumstances will it review a question not raised in the court below. *Duignan* v. *U.S.*, 274 U.S. 195, 200 (1927). With that case, the court simply validated what has long been an axiom of Appellate practice for which hundreds of lower court cases, both State and Federal, could be cited. Since there exists no exceptional circumstances in the case at hand, this Court would not be abusing its discretion in denying *certiorari* on this ground alone.

Petitioner will no doubt point out that sections of her Petition are indeed devoted to the question of the constitutionality of A.R.S. § 15-1471. However, two criticisms would still remain. First, why was the issue not included as part of the "Questions Presented" (or alternately, if Petitioner meant her Question I to cover this issue, why did she not say so in clear, simple language)? Second, and more important, Respondent respectfully submits that even this issue is not properly before this Court, notwithstanding the fact that it was the main question on appeal below.

In making this latter assertion, Respondent is simply repeating its argument made before the Arizona Court of Appeals in its Reply brief (portions of which are reproduced as Appendix E herein). In that court, Respondent in effect pointed out that Petitioner, the Appellant below, made a substantial change of position on

her way up from Superior Court. At trial, it was steadfastly maintained by Petitioner that A.R.S. § 15-1471 made age seventy the compulsory retirement age for Arizona's teachers, and that Respondent discriminated against Petitioner for retiring her at sixty-five, especially when other school districts allowed teachers to continue working past sixty-five. (Although there was never any evidence presented in the Arizona courts as to actions of any other school district with respect to allowing teachers to work past age sixty-five.)

Having lost this argument in Superior Court, Petitioner presented on appeal the question of the constitutionality of A.R.S. § 15-1471. In doing so, she argued that sixty-five was indeed the mandatory retirement age for teachers, but since State employees were allowed to work until seventy, Respondent was denying Petitioner equal protection. In other words, at trial Petitioner argued that seventy was the mandatory age, but on appeal she argued that sixty-five was in fact the mandatory age. Respondent, in its Reply Brief below, contended that the question of whether there exists a rational basis for making sixty-five the retirement age for teachers was not an issue at trial, and therefore not reviewable.

In basing its decision on the issue as framed by Petitioner, the Arizona Court of Appeals implicitly adopted Petitioner's point of view without expressly passing on the reviewability of the question presented. However, if the lower court was erroneous in taking Petitioner's appeal in the first place, this Court should not allow the mistake to go uncorrected by again accepting Petitioner's issues without question.

II. No Significant Question of Federal Law

1. *Equal Protection*

Petitioner contends that it is unconstitutional for Respondent to set a standard of retention of teachers after

sixty-five years of age different from the standard imposed on "other State employees." This argument is based on the assumption that a public school teacher is a State employee, an assumption which is clearly erroneous under the Arizona law.

It is true, as is stated at page 6 of the Petition, that in Arizona, a school district is "an agency of the state." See *School Dist. No. 48 of Maricopa County* v. *Rivera*, 30 Ariz. 1, 243 P. 609 (1926), overruled on other grounds, 93 Ariz. 384, 381 P.2d 107 (1963). However, Arizona case law also recognizes that a school district is a political subdivision of a county, *Sorenson* v. *Superior Court in and for Maricopa County*, 31 Ariz. 421, 254 P. 230 (1927), a status which ultimately makes the school district a political subdivision of the State.

Terminology is important here because Arizona's State Retirement System, Arizona Revised Statutes (A.R.S.) § 38-741 *et seq.*,[1] makes a clear distinction between employees of the State and its instrumentalities on one hand and employees of political subdivisions on the other. For example, A.R.S. § 38-745A, (1973 Supplementary Pamphlet) which defines who is a member of the retirement system, reads in part:

> "All employees and officers of the state . . . and employees of political subdivisions . . . who as a result of state service or service for the political subdivision . . ."

Subsection B of the same statute reads in part:

> "All employees and officers of political subdivisions and instrumentalities of political subdivisions whose compensation is provided wholly or in part from state funds, *and who are declared to be state em-*

[1] Respondent's argument is based on the statutes as they existed in 1973, the time at which Petitioner first became subject to the provisions of the retirement system.

> *ployees and officers by the legislature* for retirement purposes . . . shall be members of the retirement system." (emphasis supplied)

The clear import of the above language is that employees of a political subdivision are *not* State employees unless they are expressly declared to be such.

Under A.R.S. § 38-752 (1973 Supplementary Pamphlet), political subdivisions are authorized to adopt a supplemental retirement system "for officers and employees of the political subdivision. . . ." Finally, the same distinction is made in § 38-759H (1973 Supplementary Pamphlet), which first declares that all State officers and employees must retire at age seventy and then makes that age limit applicable to officers and employees of "political subdivisions of the state. . . ."

The definition of who is an employer supports the above interpretation. "The usual test by which, in common experience, men determine the 'employer' is to ascertain who has authority, on his own account, to 'hire and fire'." *Walling* v. *Sanders*, 136 F.2d 78, 81 (6th Cir. 1943). *Black's Law Dictionary* defines an employer as one who pays salaries. According to A.R.S. § 15-443 (1974 Supplementary Pamphlet), the Board of Trustees of a school district, not the State, is the body authorized to employ and fix the salaries of teachers. The statute reads in part:

> "The Board of Trustees may at any time employ and fix the salaries of teachers. . . ."

See also *Fry* v. *Bd. of Educ. of City and County of San Francisco*, 17 Calif. 2d 753, 112 P.2d 229, 234 (1941) (stating that "the relation between the board and a teacher is that of employer and employee. . . ."); and 68 Am. Jur. 2d at 458, 469, Schools, §§ 128, 138.

Even if teachers were considered State employees, A.R.S. §§ 15-1471 and 38-759 are not in conflict because: (a) A.R.S. § 38-752 allows a political subdivision to devise

its own supplementary retirement system; and (b) nothing in A.R.S. § 38-759 expressly prohibits a political subdivision or even the State from requiring retirement earlier than age seventy. In any case, the purpose of A.R.S. § 38-759 is to establish the earlier time at which a member may retire and still receive benefits, and not to set out regulations concerning retirement between the ages of sixty-five and seventy.

A fortiori, if a teacher is not an employee of the State, then the fact that the relevant retirement statutes allow a teacher to be retired earlier than State employees does not constitute a denial of equal protection. The presumption that runs through the retirement statutes is that employees of the State and of political subdivisions are two separate groups, although all employees of each class are subject to the State Retirement System. If Petitioner wishes to challenge the rationality of creating these two groups in the first place, then Respondent will point out that the whole purpose of creating political subdivisions is to set up separate entities in order to handle local governmental affairs. If a rational basis for the existence of a classification is present, then a challenge based on the Fourteenth Amendment cannot be sustained. See *E. G. Graham* v. *Richardson*, 403 U.S. 365, 371 (1971); *Morey* v. *Doud*, 354 U.S. 457, 465 (1957); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911). The so-called "compelling state interest" or "strict scrutiny" test is not applicable in this case because this Court, as the Arizona Court of Appeals noted (Appendix "E" of Petition at 26), has not held age classifications to be a "suspect category" and because, as will be argued *infra*, there has been no deprivation or abridgement of a fundamental right.

In its own policies, Respondent has not violated Petitioner's equal protection rights. Contrary to the assertion at page 11 of the Petition, A.R.S. § 15-1471

does not "hold out the promise" of continued employment past sixty-five. Instead, all teachers "shall be retired" at sixty-five unless the School Board approves retention. The statute is explicit in giving a school district discretion in retaining teachers, a discretion which this Court and lower federal courts have deemed to be quite wide, as long as a decision is made within statutory and constitutional limits. See *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1 (1973); *Brooks* v. *School Dist. of City of Moberly*, 267 F.2d 733, (8th Cir. 1959), cert denied 361 U.S. 894. Moreover, the statute does not require that the school district give any reason for its decision on whether to retain a teacher. Thus, the school district is free to adopt any rational criteria in making its decision, especially since there is no legislative history in evidence requiring that these criteria stem from any specific educational purpose or purposes.

Respecting the possible criteria for retiring or retaining teachers after sixty-five, it is simply not true that, as Petitioner claims at 7, Respondent or the State of Arizona could put forward only one rationale. The reason that Respondent, in its Brief in the court below (reproduced in part as Appendix E herein), elaborated on the fact that teaching is a profession more demanding than others is that Petitioner first raised this issue in her Opening Brief on appeal (reproduced as Appendix D herein). In doing so, Petitioner forced Respondent to argue factual questions not previously presented, and upon which no evidence had been adduced. She should not be permitted to do the same before this Court.

What other school districts decide concerning the retirement of teachers is of little relevance except insofar as those decisions may provide non-controlling examples of what may or may not be reasonable. As long as the Board does not discriminate among its own employees

(and Petitioner has made no such allegation), then Petitioner has not been deprived of her Fourteenth Amendment rights. Respondent is certainly not trying to avoid the Teacher's Retirement Act, as Petitioner charges at Page 10, but rather has complied with statutes which themselves are constitutional and has validly exercised its discretion.

2. *Due Process*

Respondent concedes the point that the right to follow a vocation or profession is a "property right" which cannot be deprived without due process. However, if A.R.S. § 15-1471 holds out no "promise" of continued employment past age sixty-five, as argued *supra*, then school district employees, even if tenured, cannot be said to have a legitimate claim of employment after that age, *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972) (dealing with the dismissal of untenured college professor). Thus Petitioner does not have any property right and considerations of due process do not apply. *Bd. of Regents* v. *Roth*, *supra*.

Assuming, *arguendo*, that there is a property right involved here, due process requirements of notice and hearing have been complied with. Petitioner had notice of probable retirement at sixty-five through A.R.S. § 15-1471 and she was given a hearing on November 15, 1973, (see Appendix of Petition at 19). Apparently, Petitioner is confusing the possible due process and equal protection issues here. She cites cases such as *Goss* v. *Lopez*, —— U.S. ——, 95 S.Ct. 729 (1975), which deal with the absence of notice and hearing, but uses them to support the proposition that the State may not set different standards for various groups of employees. In addition, she cites no cases to support her argument that there is a right to continue teaching after normal retirement age. Respondent has in fact more than fulfilled its duties by providing notice and hearing where none were constitutionally necessary.

III. No Conflict Of Decisions

As Petitioner herself states at page 5 of the Petition, this is not a mandatory retirement age case. Therefore, cases dealing with mandatory retirement ages are not relevant here; and the fact that this Court has granted review in *Massachusetts Board of Retirement* v. *Murgia*, 376 F.Supp. 753 (D. Mass. 1974), has no bearing on the case at hand. Furthermore, even if such cases were pertinent, they all support *reasonable* age limits. Finally, Petitioner cites no decisions limiting a Board's discretion where constitutional safeguards have been observed, so that this Court is not being called upon to resolve any important conflicts in judicial decisions.

CONCLUSION

For all the reasons stated above, the decision of the Supreme Court of Arizona to deny review of Petitioner's case and the decision of the Court of Appeals on which that denial was based (set out in Appendix "E" to Petitioner's brief at 23 *et seq.*) were clearly correct. There has been no deprivation of Petitioner's Fourteenth Amendment rights which needs redress by this Court. Since this is a case involving the proper exercise of discretion on the part of Respondent, there is no need for the Court to impose additional standards on Respondent's decision making process. This is all the more true since retirement criteria, if reasonable and constitutional, are a matter of local and not national concern. A decision that Mrs. Lewis should be allowed to continue working would have little application to other litigants and situations, because other school districts would still retain the discretion to set their own retirement standards. For this Court to reverse Respondent's decision and strike down

the Arizona statute which allows Respondent discretion in such matters would be unwarranted invasion of the legislative sphere of State and local governmental activity. As argued *supra*, the Arizona legislature has not discriminated between sets of State employees: it has simply permitted different and distinct public employers to set their own rational retirement ages. This difference in treatment is consonant with the Constitution and its protections.

It is therefore respectfully submitted that Mrs. Lewis' Petition For Writ Of Certiorari to review the judgment of the Arizona Supreme Court denying the Petition for Review and the judgment on the merits of the Arizona Court of Appeals should be denied.

RESPECTFULLY SUBMITTED this 5th day of August, 1975.

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TUCSON SCHOOL DISTRICT NO. 1

APPENDIX

APPENDIX A

Portion of Deposition of Dr. Thomas Lee, Superintendent of Tucson School District No. 1 (taken July 30, 1973)

Q So then would it be fair to say that you judge each application for retention the same way you would judge each application to be hired as a school teacher?

A Essentially the same. There are some differences, of course, in that from my point of view a person applying for retention after retirement age needs to have certain unique abilities or capacities which are not necessarily a requirement of people in beginning teaching. I think we have got two different matters at hand here.

Q What unique, what unique ability or assets do you feel a person seeking retention should have that a person seeking a job as a beginning teacher does not have, and that will in your mind, would justify retention?

A From my point of view since the retirement law sets forth the age of 65 as the appropriate retirement age, it would seem to me beyond that point a person would need to have some unusual, some significant, unique quality which would not be realized by someone else, and if they have this kind of quality then naturally it would be working to the detriment of the district to see this person discharged. But if there is no, nothing other than the usual high ability which we think our people generally have, there is nothing unique about that, and therefore, the individual can be replaced and the purpose of the Retirement Act can come into force.

Q When you say, "unique ability," could you define it a little more precisely the type you refer to?

A For instance, the district has, since I have been working with it, continued the employment of some individuals beyond the age of 65 who have these unique abilities. For instance, C. A. Carson who was Associate Superintendent for some years, had been handling the district's recruitment program, visiting colleges around

the country and continuing placement offices and talking with prospective teachers and he had developed a contact with the placement office and with the colleges which was personal and I think rather unique and had permitted us through that contact to acquire some of the finest teachers available anywhere. So upon his retirement he wanted to continue this part of his work and the Board approved it, and until his death he continued under contract to do the recruiting for the district because of his unique ability.

Q Well, this unique ability that you refer to in his case was the fact that he knew certain people and had contacts with certain people and no one else that you could find would have the same contact and acquaintanceships that he would have?

A Right.

Q When we refer to a teacher as Mrs. Lewis, as distinguished from someone in an administrative job such as Mr. Carson, what type of unique ability do you refer to?

A Well, we haven't, so far as I know, approved a classroom teacher for continuing because it's much more difficult for a teacher to have a highly unusual or unique ability and that can be replaced. I can think of one or so that I would have thought possibly would fit such a bill, but they have been interested in continuing but they didn't ask and so they didn't.

Q Who are these that you could have?

A For instance, just one case in point, I think a man like George Bassett who had taught at Tucson High School in chemistry was a unique individual. He had taught at the University in training classes with the University Professors and is recognized for his ability in chemistry and it went far beyond the local district. I felt George possessed characteristics of a good teacher that just simply are not possessed by more than one out of a thousand and I think it was too bad that we had

to lose his services, but, he didn't want to teach anymore.

Q Had you actually observed Mr. Bassett teaching?

A Yes.

Q So when we talk about teaching ability, are we talking about teachers in sort of a prize winning category as distinguished just from the ordinary competent teacher?

A I think it would be some capacity or something that provided the district, which the district could not provide otherwise and—

Q Some unique level of competency, would that be it?

A Well, possibly, it's very difficult to put these things into words, that is why we had a struggle for years over teacher evaluation.

Q Aside from Mr. Bassett whom you have mentioned, is there any other teacher that you can think of that would have possessed the type of unique ability which in your mind would have justified retention had they applied?

A Well, at the moment I can't recall one here in Tucson. There probably are, I just haven't had that kind of close contact with them. I just happened to know George quite well.

Q Do you know whether or not Mrs. Lewis has this type of unique ability such as Mr. Bassett had that might have justified her retention?

A Well, I haven't had any indication from any source that she had unique abilities. She is a very competent, very able, good teacher, but I think we have many, many, many of them and they are available for employment at this point to replace people of this kind.

* * * *

APPENDIX B

Portion of Minutes of Tucson School District No. 1, Meeting, November 5, 1973

BY THE CHAIRMAN: This is Mr. Bruce Patrick, Personnel Office.

Mr. Patrick, would you—I think Dr. Lee has suggested that you might be able to suggest some limit on the employment situation in terms of District 1 and availability of teachers and pertinent material that would be of anyone to both the Board and to Mrs. Lewis.

BY MR. PATRICK: All right, sir. Well, I checked in our applications that are currently on hand. In our department prior to August 15th, we had 304 applications on hand. This is in the area of English, Journalism, Language, Arts, Reading and Speech English. Since August 15th we received in those specific areas, 14 additional applications which makes a total of 318. By the same token, all together in the file, where we do a lot of cross filing between social studies and English, we do have a total of 369 applications in our file. In the area from English down to Speech English, the number of people that were new to our district this fall in these areas, amounted to 15 at the high school level. That would be 309 and 12½ at the Jr. High School level, we currently have approximately 339 people that are involved in some way, shape or form in the teaching of English in our secondary level.

Does the Board have any questions?

BY BOARD MEMBER: What about the qualifications of these 339 that you have on file. What kinds of people are they, new teachers; are they new teachers with experience or—

BY MR. PATRICK: It would be anywhere from brand new to, I would guess, highly experienced in number of years, but these are people that are certified, or could be certified in English in the area.

BY BOARD MEMBER: Do they all have Secondary Certificates or isn't it necessary, or do you distinguish—on—do you have some allocation on file for just an elementary certificate that would be capable of teaching in a Jr. High School?

BY MR. PATRICK: This does not—well, these figures that I gave you are all people that could be certified at a secondary level. Now, of course, all of the—most all of the elementary applications which are not counted in this go from A-B Arizona says we could work. I say we—I mean, elementary, we could work at a Jr. level. These are the only people that are certified for secondary which the old certificate would say 7-12.

BY THE CHAIRMAN: Are there any other questions, Mr. Brammer?

BY BOARD MEMBER: You mentioned the date of August 15th, that is 1973?

BY MR. PATRICK: Yes.

BY THE BOARD MEMBER: Those were on hand as of August 13, 1973?

BY MR. PATRICK: Yes.

BY THE CHAIRMAN: Mr. Schwartz, do you have any questions?

BY MR. SCHWARTZ: I'm not sure I understand the thrust of Mr. Patrick's remarks; I would like some clarification.

BY THE CHAIRMAN: Mr. Lee?

BY MR. LEE: Mr. Patrick, will you indicate to the Board when you replace or retire or someone was leaving and apparently based on your information, could we replace every English teacher in the district if they were to quit simultaneously? I felt that was information—that was, if they all quit together. Does that answer your question?

BY MR. SCHWARTZ: Yes.

No, I'm afraid I don't see the relevancy to the question that we are here for and that is to evaluate Mrs. Lewis' application; that could be pointed out. I would appreciate it.

APPENDIX C

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. 142873

ELIZABETH LEWIS,
Plaintiff,

vs.

TUCSON SCHOOL DISTRICT NO. 1,
Defendant.

JUDGMENT

This matter having come on regularly for hearing before the Court, sitting without a jury, on February 25, 1974, and counsel for Plaintiff and Defendant having submitted memoranda to the Court for consideration, and the parties having entered into a stipulation approved for filing by the Court on February 11, 1974, and counsel for both parties having argued the matter to the Court, the Court finds that the language of A.R.S. § 15-1471 indicates that a teacher shall be retired at the end of the school year following the date on which the teacher attains the age of sixty-five (65), unless continued employment is approved by the employer. In no event may a teacher be employed for a school year past the year in which the teacher attains the age of seventy (70). However, the legislature did not set out a standard for the employer to follow in determining whether to approve continued employment past age sixty-five (65). In such situations the Court will infer that a standard of reasonableness is to be applied.

The Court further finds that Defendant has set as its standard one that calls for approval of continued

employment past age sixty-five (65) if termination of the employee's services would prove injurious to students or if the employee would be difficult to replace. The Court finds this standard to be reasonable.

The Court further finds that Plaintiff has now had her application considered on its own particular merits by the Defendant. The Defendant has exercised the discretion which it had a duty to exercise. The function of the Court in reviewing the decision of the Defendant is to determine whether or not the evidence presented to the Defendant sustains the decision of the Defendant, and not to hold a trial *de novo*. The Court finds that the evidence was sufficient to sustain the decision. The Defendant's determination was not arbitrary, nor capricious, nor an abuse of discretion.

The Court further finds that there was no deprivation by Defendant of Plaintiff's right to pursue a calling, or any invidious discrimination against Plaintiff on the basis of age.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant be, and hereby is, awarded judgment from and against Plaintiff on Plaintiff's Supplemental Complaint in special action filed herein, and that Plaintiff take nothing thereby, and that Defendant be awarded its costs.

DONE IN OPEN COURT this 26 day of March, 1974.

/s/ Richard N. Roylston
Judge of the Superior Court

APPROVED as to form this 25 day of March, 1974:

MILLER, PITT & FELDMAN, P.C.

By /s/ Jeffrey H. Schwartz
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Tucson, Arizona 85701
Attorneys for Plaintiff

APPENDIX D

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

No. 2 CA-CIV 1968

ELIZABETH LEWIS,
Appellant,

vs.

TUCSON SCHOOL DISTRICT No. 1,
Appellee.

APPELLANT'S OPENING BRIEF

NATURE OF THE CASE

This is an appeal by Mrs. Elizabeth Lewis, Plaintiff below, solely on the question of whether *A.R.S.* § 15-1471, which singles out public school teachers from all other governmental employees and requires them to retire at age 65, invidiously discriminates on the basis of age and therefore violates the equal protection clauses of the state and federal constitutions.

HOW THE ISSUES WERE DECIDED AND WHAT JUDGMENT WAS GIVEN

Appellant filed a special action in the Court below, alleging, inter alia, that as applied to Appellant, *A.R.S.* § 15-1471 violated the equal protection clauses of the state and federal constitutions. Appellant also urged Tucson School District No. 1 and the Court below to

interpret the statute by adopting a standard of retention which could reasonably be inferred from the Teachers Retirement Act and would be nondiscriminatory and would, therefore, save the statute from being held void. In the absence of Appellee's adopting such an interpretation, Appellant urged that *A.R.S.* § 15-1471 denied equal protection under the law. The Court below declined relief.

Appellant then attacked the interpretation of the statute as made by the School Board and the Court below, by original special action in the Court of Appeals and the Supreme Court of Arizona. Both Courts declined to accept jurisdiction of Mrs. Lewis' petition for relief, thereby giving approval to the standard of retention adopted by the School Board and the Court below. The question on this appeal, therefore, is whether the decision of the School Board and the judgment of the Superior Court of Pima County is erroneous when considered in the light of the prohibition against denial of equal protection of the law.

QUESTION PRESENTED FOR REVIEW

IS *A.R.S.* § 15-1471 UNCONSTITUTIONAL INSOFAR AS IT REQUIRES ALL PUBLIC SCHOOL TEACHERS TO RETIRE AT AGE 65 WHEREAS ALL OTHER GOVERNMENTAL EMPLOYEES ARE PERMITTED TO CONTINUE AS STATE EMPLOYEES UNTIL AGE 70?

FACTS

Tucson School District No. 1 interpreted *A.R.S.* § 15-1471, which requires public school teachers to retire at age 65 unless they obtain their employer's approval, to compel the retirement of all teachers at age 65 except upon a showing of irreplaceability and damage to the students. As a result of that interpretation of *A.R.S.*

§ 15-1471, Mrs. Lewis was forced to retire at age 65, even though it was conceded she was mentally and physically fit and competent to continue teaching successfully as an employee of the State. Mrs. Lewis brought a special action in Superior Court alleging inter alia that *A.R.S.* § 15-1471 violated the equal protection clauses of the state and federal constitutions.

Mrs. Lewis sought an interpretation of the statute which would have avoided its constitutional infirmity by requiring Tucson School District No. 1 to continue employing teachers who attain the age of 65 if they are mentally fit and competent to continue teaching, but such interpretation was not adopted by the School Board nor by the Court below. To the contrary, *A.R.S.* § 15-1471, as interpreted by the School Board, was held to be reasonable and not to invidiously discriminate against Mrs. Lewis on the basis of her age. This application of the statute to Mrs. Lewis was upheld by the Court of Appeals and the Supreme Court of Arizona when they declined to accept jurisdiction in special actions filed by Mrs. Lewis.

Mrs. Lewis presently challenges *A.R.S.* § 15-1471 as now interpreted, on the grounds that it conflicts with the policy of the State of Arizona as manifested in *A.R.S.* § 38-759, under which all other State employees, including educators, are not forced to retire until age 70, and are allowed in special circumstances to continue teaching past the age of 70.

The record on appeal establishes (insofar as relevant to this appeal) that Mrs. Elizabeth Lewis was a "continuing teacher" at Townsend Junior High School, a subdivision of Tucson School District No. 1, for fifteen successive years. She properly made application to Appellee School Board for renewal of her employment contract in the school year in which she attained the age of 65 in accordance with *A.R.S.* § 15-1471. Her application

was not considered on its own individual merits by Appellee and was summarily denied. On June 6, 1973, Mrs. Lewis brought a special action attacking the Board's abuse of discretion in failing to approve her application, and challenging the Board's policy of refusing employment to teachers who reached the age of 65 as a denial of due process and equal protection arising under the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of Arizona. The Court ruled that she had a right to have her application individually considered on its own merits and ordered Appellee to so consider her application.

On November 5, 1973, Appellee Board met in closed, informal session with Appellant and her attorney. Appellee, though previously requested by Appellant, failed to furnish Appellant with any indication of the criteria upon which their decision would be reached. Appellee did accept oral and written evidence from Appellant, but permitted no other person except Appellant's attorney to speak in her behalf.

The evidence submitted to the Board clearly and convincingly demonstrated the following:

1. Appellant is physically and mentally fit and competent to continue teaching;

2. Appellant has a distinguished education background which includes 39 years of dedicated service to her students;

3. Appellant has received in prior years voluminous unsolicited letters of recommendation from students and parents commending her teaching abilities;

4. Appellant has won the respect of students, parents and teachers and has an established reputation in the community as an excellent teacher;

5. Appellant's principal, Clarence Logan, who evaluated Appellant's teaching abilities on June 8, 1973, in

the course of his regular duties, gave Appellant an "Excellent" on her over-all rating and commented: "Mrs. Lewis is a rarity."

6. Principal Logan on or about October 22, 1972, forwarded Appellant's appeal for continued employment after age 65 to Appellee and made the following recommendation:

> "I consider Mrs. Elizabeth Lewis one of the finest teachers one could find anywhere. She is a truly professional teacher, and I highly recommend her request be granted."

7. Appellant was nominated in 1973 for The Best Teacher in Arizona Award;

8. Appellant's students have consistently won first prizes in local and state spelling and essay contests;

9. Appellant has made a variety of extracurricular contributions to her school as supervisor of the students' literary magazine, newspaper, creative writing and stock market clubs;

10. The failure to rehire Appellant would deprive students, parents and the community of a truly professional teacher.

On December 18, 1973, Appellee Board refused to approve Mrs. Lewis' application at its regularly scheduled public meeting.

In a judgment dated March 26, 1974, the Honorable Richard N. Roylston found that *A.R.S.* § 15-1471 did not discriminate against Appellant on the basis of age and thus did not work a violation of equal protection.

The sole question presented on appeal is whether two conflicting Arizona statutes which set forth different retirement ages for educators is a classification without rational basis which invidiously discriminates against Appellant and denies her equal protection under the law.

ARGUMENT

I. HAVING ONE MANDATORY RETIREMENT AGE FOR ELEMENTARY AND SECONDARY SCHOOL TEACHERS AND ANOTHER FOR OTHER GOVERNMENT EMPLOYEES IN THE STATE OF ARIZONA CREATES A CLASSIFICATION.

A.R.S. § 15-1471 provides as follows:

> "Any teacher in active service who becomes a member of the state employees' retirement system pursuant to provisions of this article, shall be retired for service at the end of the school year following the date upon which he attains the age of 65, unless his employer approves and forwards annually to the state employees' retirement system board his application to be retained in his employment on a year to year basis. Teacher members in service shall be retired at the end of the school year following the date on which they attain the age of 70, whether or not they apply to be retained."

This retirement provision is applicable to teachers from grades kindergarten through high school employed by political subdivisions throughout the State.

This section contrasts sharply with the retirement regulations prescribed for other public officers and employees.

A.R.S. § 38-745 establishes a retirement system open to "all employees and officers of the state and instrumentalities of the state and all officers and employees of political subdivisions," if the employees of political subdivisions are compensated "wholly or in part from state funds" and "are declared to be state employees and officers by the legislature for retirement purposes."

Members of the State Retirement System are allowed to retire upon attaining the age of 65, but may be com-

pulsorily retired only upon attaining the age of 70. *A.R.S.* § 38-759 H. An additional provision provides that "employees of institutions under control of the Arizona Board of Regents who reach the age of 70, as long as they continue to render valuable service to the institution employing them, may continue to be employed at the discretion of the Board of Regents." *A.R.S.* § 38-759 I.

All State employees, and any county and local employees, are covered by *A.R.S.* § 38-759. This is also the section applicable to retirement for service for members of the State University system. Thus, educators who teach at a college level may not be mandatorily retired until the age of 70. Even after that age, they may be continued in employment at the discretion of the Board of Regents.

In sharp contrast to this treatment is that of educators teaching at the elementary and secondary levels. *A.R.S.* § 15-1471, as interpreted by the Arizona Supreme Court, requires mandatory retirement at age 65. Although a teacher may be continued in employment until age 70, this is at the discretion of the individual employer.

These two statutes conflict and result in the classification of certain educators who must retire at age 65, and others who may remain in active service until age 70. Teachers at the college level may not be forced to retire before age 70. See *Finch* v. *State Department of Public Welfare*, 80 Ariz. 226, 295 P.2d 846 (1946). Educators who work at the elementary or secondary level may be forced to retire at age 65. This classification is not dependent upon educational, professional, or personal attainments, since many educators who could teach at the college level choose to teach at the elementary or secondary level.

Although regulations establishing age ceilings for public employment are not, per se, prohibited by and therefore violative of the equal protection clause, *Weiss* v. *Walsh*, 324 F. Supp. 75 (D.C.N.Y. 1971), maintenance by a state of one retirement age for elementary and secondary teachers, and another retirement age for all other government employees including teachers at the college level, creates a distinct class of government employees without a constitutionally permissible basis therefor.

II. THIS CLASSIFICATION OF GOVERNMENT EMPLOYEES IS WITHOUT RATIONAL BASIS AND DENIES APPELLANT EQUAL PROTECTION UNDER THE LAW.

The equal protection clause of the Fourteenth Amendment of the Constitution of the United States prohibits classifications and distinctions which are arbitrary and capricious and bear no reasonable relation to the purpose of the law. *F. S. Royster Guano Company* v. *Commonwealth of Virginia*, 253 U.S. 412 (1919). When a "fundamental right" or a "suspect category" is involved, the burden upon the state is much stricter and it must show a compelling state interest in order to uphold its regulation. *E.g. Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (right to travel); *Levy* v. *Louisiana*, 391 U.S. 68 (1968) (legitimacy of birth); *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (race); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966) (voting); *Cleveland Board of Education* v. *LaFleur*, 94 S.Ct. 791 (1974) (sex).

The burden is upon the state to justify its otherwise impermissible regulation of constitutional rights by proving that it has either a rational basis or compelling state interest to justify its actions. *Murgia* v. *Massachusetts Board of Retirement*, 42 U.S.L.W. 2640 (D.C. Mass. 1974).

Nelson v. *Miwa* (Hawaii Circuit Court, 1973), facing a nearly identical fact situation, failed to find any rational basis in a classification which forced college professors to retire at age 65, but permitted other state employees to work until age 70. The District of Columbia Court of Appeals has gone even farther and questioned the legitimacy of forced retirement at age 70 of a government attorney by reversing a lower court dismissal and remanding the case for consideration of its constitutional claims. *Weisbrod* v. *Lynn*, 494 F.2d 1101 (1974).

Appellee has failed to show the rationale behind providing different retirement ages for educators. It cannot be argued that teaching at the elementary or secondary level is more demanding—physically or intellectually—than teaching at the college level. Nor can it be argued that education is a more demanding profession than that of any other state employee who may not be compulsorily retired until age 70.

However, even if Appellee can present data showing that elementary and secondary-level educators must meet physical and mental standards higher than those required for all other State employees, it is incumbent upon Appellee to show that Mrs. Lewis fails to meet these standards. This Appellee cannot do, since it has already admitted that Mrs. Lewis is both physically and mentally competent to perform her job. The two statutes may be constitutionally reconciled only if the State can first prove that a higher level of mental and physical acuity is required for elementary and secondary teachers, and then show that it has set up standards which examine individuals on those factors only, and make no distinction solely on the basis of age.

This classification of State employees thus remains without a rational basis and effects a denial of Appellant's constitutional right of equal protection.

III. CLASSIFICATION OF GOVERNMENT EMPLOYEES FOR RETIREMENT PURPOSES DEPRIVES APPELLANT OF PROPERTY RIGHTS PROTECTED UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Forced retirement at age 65 is detrimental to Appellant and others in her class, both in a pecuniary and non-pecuniary manner. First, she is deprived of her right to pursue a calling or profession, thereby to work and to sustain herself. *York* v. *State*, 498 P.2d 644 (Hawaii 1972). Second, by being required to retire at age 65, when no other public employees can be compelled to retire until age 70, Appellant is deprived of the opportunity to earn additional retirement credits between the ages of 65 and 70 and thereby further her retirement security. Such inequality of retirement between State employees, specifically educators at different levels within the state education system, has no constitutionally permissible basis and violates the equal protection clause. *Nelson* v. *Miwa* (Hawaii Circuit Court, 1973).

CONCLUSION

Appellant Mrs. Lewis has been denied equal protection by virtue of an impermissible statutory classification which forces her to retire at age 65, but permits other State employees, including educators at the college level, to remain at their jobs until age 70. This classification is impermissible since no rational basis exists which can justify such unequal treatment of government employees in general, and educators in particular.

It is admitted by Appellee that Mrs. Lewis is a competent teacher, mentally and physically capable of continuing to work. Appellant contends that this Court, upon review, should grant her that constitutionally protected

right to be free of impermissible classification, and set aside the judgment in the Court below and find for Appellant.

Dated this 3rd day of September, 1974.

MILLER, PITT & FELDMAN, P.C.
by Stanley G. Feldman

APPENDIX E

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

No. 2 CA-CIV 1968

ELIZABETH LEWIS,
Appellant,

vs.

TUCSON SCHOOL DISTRICT #1,
Appellee.

BRIEF FOR APPELLEE

DECONCINI MCDONALD & BRAMMER, P.C.
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Attorneys for Appellee

Filed October 2, 1974

QUESTION PRESENTED FOR REVIEW

IS A.R.S. § 15-1471 UNCONSTITUTIONAL INSOFAR AS IT REQUIRES ALL PUBLIC SCHOOL TEACHERS TO RETIRE AT AGE 65, WHEREAS ALL STATE EMPLOYEES ARE PERMITTED TO CONTINUE WORKING UNTIL AGE 70?

ARGUMENT

I.

APPELLANT, THROUGH FAILURE TO RAISE THIS ISSUE IN THE SUPERIOR COURT, CANNOT PRESENT THIS ISSUE TO THE APPELLATE COURT FOR DECISION.

Initially, Appellant did not raise in the lower court the question she now raises on appeal; and, therefore, this issue should not now be decided by the Court of Appeals.

Appellant, in her Supplemental Complaint (Count XIV, Page 5, Abstract of Record), asserts an equal protection claim by alleging that all teachers over 65 are not treated equally under A.R.S. § 15-1471. Her contention rests on the fact that many districts retain their teachers over 65 while Appellee does not and such unequal treatment constitutes invidious discrimination and violates Appellant's right to equal protection. Appellant further argued below that teachers over 65 are being denied equal protection as Appellee summarily denies all applications for retention of individual teachers over 65 who wish to continue teaching. (Abstract of Record Pages 25-26) These equal protection arguments were thoughtfully decided by the lower court in favor of Appellee. Having them rejected, Appellant now attempts

to adopt a new theory which allegedly indicates she has been denied equal protection of the laws by Appellee.

Appellant now questions the constitutionality of A.R.S. § 15-1471 insofar as it requires public school teachers to retire at age 65, whereas all other State governmental employees are permitted to continue until the age of 70 pursuant to A.R.S. § 38-759. It is claimed that there is no rational basis for having teachers retire at 65, while all other State employees have mandatory retirement at age 70. Since the question was not raised below, no evidence was presented to support it; and, therefore, the record is devoid of evidence supporting Appellant's position. Appellant raises this naked assertion on appeal, rather than produce in the trial court the factual and legal evidence necessary to support her allegations. Appellant, having failed to raise below the issue she now raises on appeal, asks this court to squarely face the issue without the benefit of having the factual and evidentiary problems settled in the lower court.

The Court of Appeals cannot reverse a trial court on an issue which was never presented to the trial court. *Walker* v. *Continental Life and Acc. Company*, 445 F.2d 1072 (9th Cir. 1971); *Maricopa County* v. *American Pipe and Construction Company*, 431 F.2d 1145 (9th Cir. 1970). Additionally, it is a well known axiom of Appellate practice that matters *not* presented to the lower court will *not* be considered on appeal. *Goldberg* v. *Weiner*, 480 F.2d 1067 (9th Cir. 1973); *Milam* v. *Milam*, 101 Ariz. 323, 419 P.2d 502 (1966); *Bible* v. *First National Bank of Rawlins*, 21 Ariz. App. 54, 515 P.2d 351 (1973); *Leehy* v. *Ryan*, 20 Ariz. App. 110, 510 P.2d 421 (1973); *National Car Rental* v. *Fox*, 18 Ariz. App. 160, 500 P.2d 1148 (1972); *Weston* v. *State ex rel Eyman*, 8 Ariz. App. 58, 442 P.2d 881 (1968); *Kenyon* v. *Kenyon*, 5 Ariz. App. 267, 425 P.2d 578 (1967).

With the law clearly settled on the proposition that issues cannot be initially raised on appeal, and the record clear that Appellant's equal protection argument was not advanced in the Superior Court under the theory now articulated, this court is left with no choice other than dismissing the appeal and affirming the trial court's decision in favor of Appellee.

* * * *

II.

Although the Appellate Court is not the place to argue previously unpresented factual questions, Appellee will indicate some possible reasons relating to the legislature's decision to set forth a mandatory retirement age for public school teachers.

The public policy of the State of Arizona is clearly manifested by the legislature by the enactment of A.R.S. § 15-1471. The State has a special burden to educate its residents. The heavy responsibility of educating is placed upon the teaching profession which obviously differs from other State employment in many respects including the special vulnerability of the populace in which they teach, the high duty of care owed to that group and the unique responsibility to provide an effective system of education. As most public school teachers would agree, their job is totally dissimilar from other State employees. There is tremendous pressure and duty fostered upon the individual who chooses to teach young adults ranging from ages 5 to 18, many of whom are attending school solely as a result of compulsion. The legislature may have had many legitimate reasons for the statute such as establishing a viable retirement program, the problem of elderly teacher absenteeism, classroom discipline, safety of school children, and the biological changes that are inherent with age. The legislature, in its lawmaking discretion, recognized the complexities of public education and determined in exercising its judgment that all public school teachers should retire at age 65, but provided that they could annually continue until age 70 upon application and school board approval. The difficult decisions concerning allowing teachers over 65 years of age to continue was fully left to the discretion of the local school boards. The United States Supreme Court, as did the legislature of Arizona, has recognized the plethora of problems that confront public education and the discretion allowed school boards in solving them. See *San Antonio Independent School District* v. *Rodriquez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973).

* * * *